MESPELT & ALMASY MINING CO.

IBLA 85-891 Decided August 26, 1987

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving conveyance of lands to Native regional corporation. AA-8103-2.

Affirmed.

1. Alaska Native Claims Settlement Act: Easements: Access -- Alaska Native Claims Settlement Act: Easements: Decision to Reserve -- Mining Claims: Generally

   Where a mining partnership fails to show that access to its mining claims will be affected by a BLM decision not to reserve a right of public access across lands conveyed to a Native corporation, the BLM decision will be affirmed.

APPEARANCES: Theodore J. Almasy, pro se; James Q. Mery, Esq., Fairbanks, Alaska, for Doyon, Limited; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Mespelt & Almasy Mining Co., through co-owner and partner Theodore J. Almasy, appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 29, 1985, modifying in part its decision of April 30, 1979, holding lands to be proper for regional selection and approving them for conveyance to Doyon, Limited (Doyon), pursuant to section 12(c) of the Alaska Native Claims Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. § 1611(c) (1982). In its decision of July 29, 1985, BLM deleted easement EIN 13 C3, D1 which had been reserved in the April 30, 1979, decision pursuant to section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976). EIN 13 C3, D1 is "[a]n easement for an existing access road sixty (60) feet in width from Medfra northerly to public lands and the Nixon Fork Mine." BLM also modified the April 30, 1979, decision by adding the following provision under the proviso "[t]he grant of lands shall be subject to":

3. Any right-of-way interest in FAS Route No. 2790, Medfra-Nixon Road, transferred to the State of Alaska by the Quitclaim Deed dated June 30, 1959, executed by the Secretary

> of Commerce, under the authority of the Alaska Omnibus Act, Public Law 86-70, 73 Stat. 141, as to Secs. 17, 18, 20, 29, and 32, T. 26 S., R. 22 E., Kateel River Meridian, Alaska.

Almasy and his partner are the owners of unpatented mining claims located in T. 26 S., R. 21 E., and R. 22 E., Kateel River Meridian. In his statement of reasons, Almasy indicates that the quitclaim deed of June 30, 1959, was limited to that portion of FAS Route No. 2790 lying within T. 27 S., R. 22 E. Almasy asserts that the State of Alaska has not spent any funds to maintain that portion of the Medfra-Nixon Road passing through T. 26 S., R. 22 E. According to Almasy, he has maintained that portion of the road traversing T. 26 S., R. 22 E., and crossing his mining claims since 1963 at his own expense. Almasy contends that deletion of EIN 13 C3, D1 denies him his right of access to his claims. Almasy requests "[t]hat EIN 13 C3 D1 be restored to cover any/or all of that portion of the Medfra-Nixon Fork Road, FAS Route 2790, that may not fall under or be covered by the Quitclaim Deed * * * and may thus be open to challenge and subject to closure if not so protected." He further requests that EIN 13 C3, D1 be modified to recognize a right of relocation of the road where it crosses active mining claims. Almasy concludes by asserting that the quitclaim deed fails to guarantee access.

In response, BLM asserts that Almasy does not have standing because he has not shown that he has a property interest in land affected by the decision as required by 43 CFR 4.410(b). BLM states that mining claimants who have unpatented claims outside a conveyance area have been given standing to challenge BLM's failure to reserve public easements to a block of public land, but they do not have standing to assert a private right of access to their particular mining claims. BLM asserts that Almasy is asserting only a private right of access.

BLM contends that the existing "Omnibus Act" road does provide a satisfactory public access route, and no greater rights could be established under section 17(b)(1) of ANCSA. BLM asserts that due to the sufficiency of the extant right-of-way, there is no reasonable necessity for reserving a section 17(b)(1) public easement and that BLM's deletion of the easement was proper.

Doyon also filed a response to Almasy's statement of reasons. Doyon points out that private right of access of mining claims was preserved by section 17(b)(2) of ANCSA, 43 U.S.C. § 1616(b)(2) (1976), and therefore, Almasy's appeal is without merit.

In his supplemental statement of reasons, Almasy asserts that both the State of Alaska and Mespelt & Almasy have established prior rights to the land in question and that a favorable decision to either or both would render this appeal moot. He seeks the reservation of a public easement pursuant to section 17(b)(1) of ANCSA, 43 U.S.C. § 1616(b)(1) (1976).

Assuming, without deciding the question, that appellant has made a discovery, there would be no question that he has a property interest in his mining claims. It is settled law that an unpatented mining claim supported by discovery of a valuable mineral deposit is "property in the fullest sense of the word." Forbes v. Gracey, 94 U.S. 762 (1877); Henry W. Waterfield, 77 IBLA 270 (1983); see also Joseph C. Manga, 5 ANCAB 224, 88 I.D. 460 (1981). Assuming that there is a valid claim supported by discovery, a right of access impliedly granted by Congress under the general mining laws for mining purposes across public land is well recognized by both the Department and the courts. Herbert I. Stewart, 82 IBLA 329 (1984); see also United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963); "Right of Mining Claimants to Access Over Public Lands to Their Claims," Solicitor's Opinion, 66 I.D. 361 (1959).

Both BLM and Doyon argue that appellant's private right of access is sufficiently protected under section 17(b)(2) of ANCSA, 43 U.S.C. § 1616(b)(2) (1976) without any express reservation. Section 17(b)(2) affords appellant a statutory basis to assert a status quo protection for "whatever right of access as is now provided for under existing law." The private right of access provided to holders of valid existing rights pursuant to section 17(b)(2) of ANCSA is separate from the right provided in section 17(b)(1) of specifically identified public access routes. Possible protection under section 17(b)(2) does not preclude the holder of a property interest from asserting that an easement decision affects his interest so as to satisfy the standing test of 43 CFR 4.410(b). However, an individual claiming standing to appeal an easement decision must assert public use of the desired easement in order to distinguish it from a section 17(b)(2) private access right. Joseph C. Manga, supra.

Appellant has not shown how the deletion of EIN 13 C3, D1 affects his right of access to his mining claims. As BLM points out in its response the Medfra-Nixon Road was expressly conveyed to the State of Alaska by the quitclaim deed of June 30, 1959, which described the road as extending from the "village of Medfra north to the village of Nixon." As shown in the administrative record and on maps, Medfra is in T. 27 S., and the granted right-of-way runs north through T. 26 S. Appellant has not presented any evidence to show that the right of access which he wants BLM to preserve differs from the Medfra-Nixon Road. Therefore, he has not shown that the deletion of EIN 13 C3, D1 affects his right of access to his mining claims. We agree with counsel for BLM that there is no necessity for reserving a section 17(b)(1) easement and that deletion of the section 17(b)(1) easement was proper.

In addition, Doyon states in its answer that it has a policy of granting specific access easements to inholders that possess rights guaranteed by section 17(b)(2) of ANCSA. Doyon explains that such easements are granted in order to locate the actual route used by the inholder, thus giving Doyon an additional land management capability and giving the inholder a recordable legal document specifically recognizing his rights guaranteed by Congress. Doyon states that this option is still open to appellant.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge